INDEX

CASES CITED

TEXT CITED

In the
Supreme Court of the United States

OCTOBER TERM, A. D. 1944

MARTIN KAHNER,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Martin Kahner, by his counsel, respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

On October 20, 1942, the Grand Jury of Hennepin County at Minneapolis, Minnesota, returned an indictment against one Jacob Garon, an attorney, and Martin Kahner, the petitioner in this case, charging in the said indictment, that Jacob Garon and this petitioner, wilfully, wrongfully and unlawfully attempted to prevent and dissuade one Eugene Goulet from appearing as a

witness before the said Municipal Court in the city of Minneapolis, Minnesota, and from attending, pursuant to a certain subpoena.

Eugene Goulet had on October 11, 1942, been arrested in the city of Minneapolis for being drunk. Upon his appearance in court the next day with his attorney, he plead guilty to the charge of drunkenness and was fined $5.00 by the magistrate here in the case. Upon being questioned as to his age, he said that he was twenty years old, and based upon that statement, the magistrate ordered that a complaint be issued against the Minnesota Tavern Corporation, wherein it was claimed that Eugene Goulet had purchased three glasses of 3.2 beer.

A complaint was duly issued on the 12th day of October, 1942, against the Minnesota Tavern Corporation for selling beer to a minor and said corporation plead not guilty to the charge and trial was set for October 27th. It was in this case that a subpoena was issued for Goulet to appear as a State witness and testify against the Minnesota Tavern Corporation. The corporation was duly tried on or about the 27th day of October, 1942, and was found not guilty of the charge. The Judge who tried the case asserted in his order that Goulet being the only State's witness and the Judge not believing Goulet's testimony, found for the defendant.

The State claims that it was in this case on or about the 14th day of October, 1942, before the case was tried, that Garon and this appellant attempted to dissuade Eugene Goulet from appearing as a witness in the case.

On October 21, 1942, this petitioner was arraigned on this charge and plead not guilty, reserving the right to move to quash the indictment or to demur to same. Defendant Garon was not arraigned, having taken his own life before he could be arraigned.

Immediately after this plea had been entered by your petitioner, to-wit: on or about the 27th day of October, 1942, counsel for this petitioner discovered for the first time that Eugene Goulet, the complaining witness in the case, and the only witness against this defendant, upon whose sole testimony against this defendant, the Grand Jury predicated its indictment, was in fact an insane person, having been adjudicated insane through judicial proceedings had before his Honor Judge William M. Erickson, Judge of Probate Court of Goodhue County, Minnesota, on June 11, 1942. As a result of this adjudication, the said Eugene Goulet was on the 12th day of June, 1942, committed to the insane asylum at Rochester, Minnesota, where he remained until September 12, 1942. On the 12th day of September, 1942, he was temporarily paroled to his parents at their home in Minneapolis, Minnesota. At the time of his temporary release on September 12, 1942, he was still insane, not having been restored to his mental capacity.

Our Minnesota Statutes provide that when a person is no longer insane, and can prove his sanity, that he then may through proper legal procedure be restored to legal mental capacity. This was never done in this case and up until the very trial in the case, which trial started February 4, 1943, this defendant was still insane under the adjudication of the court as mentioned above, and was never restored to mental capacity.

As soon as counsel for your petitioner discovered the fact that this complaining witness, and only witness against this petitioner, was an insane person, he immediately moved the court, by written motion and exhibits to set aside and quash this indictment on the ground that the said indictment was illegal, and said indictment being based solely and entirely upon the incompetent

and illegal testimony of an insane person, was contrary to the rights of this defendant as guaranteed by the Constitution of the United States, more specifically Article V of the Constitution of the United States, providing that, "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Also that this indictment being based entirely upon incompetent and illegal testimony, is contrary to the Fourteenth Amendment of the Constitution of the United States in that it deprived this petitioner of his liberty without due process of law. Later on in this petition and in the brief attached hereto, we shall point out to this Honorable Court, both the State and Federal decisions that uphold our Constitution, and that the Federal question involved herein goes to the very existence of our liberty under the United States Constitution.

For the enlightenment of this Court, we are herewith setting out in full the motion and copy of the exhibits that we presented to the lower court in our move to quash and set aside the indictment. The motion was as follows:

"State of Minnesota, District Court,
County of Hennepin. Fourth Judicial District.

State of Minnesota,

Plaintiff,

vs.

Martin Kahner,

Defendant.

Affidavit.

State of Minnesota,

ss.

County of Hennepin.

Robert Greenberg, being duly sworn upon oath deposes and says that he is attorney for defendant

Martin Kahner in the above entitled action; that as such attorney he is preparing and making this motion to quash and dismiss the indictment against the above named defendant on the grounds and for the reason that the State's whole case is predicated on the testimony of one Eugene Goulet, who it appears has been adjudicated insane and has never been restored to mental capacity, and is, therefore, incompetent to testify before the Grand Jury who returned this indictment.

Affiant further states that the Grand Jury can only predicate an indictment upon legal and competent evidence and that an indictment based on the testimony of Eugene Goulet, an incompetent person, adjudicated insane by the Probate Court of Goodhue County, Minnesota, is illegal because his testimony is incompetent and said Eugene Goulet is incompetent as a witness.

Affiant further states that he was present in the Municipal Court of the city of Minneapolis, county of Hennepin, state of Minnesota, on the 27th day of October, 1942, and that he heard the testimony given by the said Eugene Goulet before the Hon. Paul W. Guilford, one of the judges thereof, and that the said Eugene Goulet, among other things, testified that he was the Eugene Goulet who was committed to the State Hospital for Mental Diseases at Rochester, Minnesota, by the Probate Court of Goodhue County, Minnesota, as shown by the transcript of his testimony hereto attached and made a part hereof.

Affiant has been further informed that the said Eugene Goulet testified in Municipal Court of the city of Minneapolis, Hennepin County, Minnesota, on the 27th day of October, 1942, before the Hon. Paul W. Guilford, one of the Judges thereof, that he is the same Eugene Goulet who was subpoenaed, sworn and testified before the Grand Jury of Henne-

pin County, Minnesota, upon which this indictment and this motion is predicated.

Further affiant saith not.

Robert Greenberg.

Subscribed and sworn to before me this..... day of....., 1942.

(Notarial Seal)

Agnes Burington,
Notary Public,
Hennepin County, Minn.

My commission expires June 16, 1946."

"State of Minnesota,
County of Hennepin.

District Court,
Fourth Judicial District.

State of Minnesota,

Plaintiff,

vs.

Martin Kahner,

Defendant.

Notice of Motion and Special Appearance.

To Frank Williams, county attorney of Hennepin County, Minnesota, and William G. Compton, assistant county attorney of Hennepin County, Minnesota, attorneys for the plaintiff:

You will please take notice that the defendant, Martin Kahner, in the above entitled action, through his attorney, Robert Greenberg, Esq., appears

specially and moves that this Court quash and dismiss the above entitled action against the defendant herein on the ground and for the reason that it appears from said indictment that the complaining witness, on which the State of Minnesota predicates its case, Eugene Goulet, appeared before the Grand Jury on the 20th day of October, 1942, and it further appears from said indictment that said Eugene Goulet swore to the truthfulness of his said testimony before the Grand Jury, and it further appears that he was a witness before said Grand Jury.

1. It further appears that at the time the said Eugene Goulet was subpoenaed and appeared as a witness before said Grand Jury and was sworn to testify before said Grand Jury on the 20th day of October, 1942, that he, the said Eugene Goulet, had been adjudicated an insane person by the Probate Court of Goodhue County by the Hon. Wm. M. Ericson, Judge of said Court, on the 12th day of June, 1942, and that thereafter and on said date the said Eugene Goulet, the person named in said Grand Jury indictment, who was sworn and appeared as a witness before said Grand Jury, was delivered to the Superintendent of the Minnesota State Hospital for Mental Diseases at Rochester, Minnesota, as shown by Defendant's Exhibit 1 hereto attached and made a part of this motion.

2. That it further appears that since his adjudication as an insane person by said Probate Court of Goodue County, Minnesota, no petition or hearing for restoration of mental capacity of said Eugene Goulet has been filed, held or is now pending, and the said Eugene Goulet is still legally adjudicated insane as shown by Defendant's Exhibit 1, sworn statement of Hon. Wm. M. Erickson, Judge of Probate Court of Goodhue County, Minnesota.

3. That the said Eugene Goulet has recently been found insane by the Probate Court of Goodhue County and that it appears from the examination

that his phsycosis is increasing as shown by said report of examination made of him by said examining board appointed by said Hon. Wm. M. Ericson, Judge of said Court.

4. That by reason of the fact that said Eugene Goulet was recently adjudicated insane by the Probate Court of Goodhue County, Minnesota, and for the further reason that he has not been restored to mental capacity, said Eugene Goulet is not a proper or competent person to take an oath and appear as a witness and give testimony before the Grand Jury of this county or any other county.

5. It is further shown by report of examination by the examining board consisting of two competent and legally practicing physicians appointed by the Hon. Wm. M. Ericson, Judge of the Probate Court of Goodhue County, Minnesota, for the examination of said Eugene Goulet, that on said date of examination, namely, June 12, 1942, the said Eugene Goulet had since 1937 "heard voices" and had a description for each different voice.

That by reason of same he is mentally incompetent to distinguish right from wrong and therefore disqualified as a competent witness to appear before the said Grand Jury.

6. That by reason of his recent adjudication of insanity by the Probate Court of Goodhue County, Minnesota, and for the further reason that he has never been restored to mental capacity, and for the further reason that the adjudication is of such recent date he, the said Eugene Goulet, upon whom the case at bar against the defendant is predicated, was not competent and did not have the legal capacity to be sworn as a witness and give testimony before the Grand Jury of Hennepin County, Minnesota, or of any other county.

7. That by reason of the fact that the said Eugene Goulet having been recently adjudicated insane and by the further fact that he has not been restored to mental capacity, this Court is without jurisdiction to try said action based and predicated by the sworn testimony of said Eugene Goulet.

8. That on the 27th day of October, 1942, the said Eugene Goulet appeared as a witness in the Municipal Court of said city of Minneapolis, Minnesota, and attempted to give testimony as to his competency as shown by Defendant's Exhibit 2, and that one Margaret McIntyre, a case worker from the State Division of Social Security, likewise testified as to his mental competency as shown by Defendant's Exhibit 2, same being a transcript of the testimony of said Eugene Goulet and Margaret McIntyre, and made a part hereof.

This motion is based upon all the files and records of the District Court of Hennepin County, Minnesota, and certified copies of complaint in insanity, the examination in insanity, commitment and letter of Superintendent of State Hospital for Mental Diseases at Rochester, Minnesota, letter from Hon. Wm. M. Ericson, Judge of Probate Court of Goodhue County, Minnesota, and on the certified record of court reporter of the Hon. Paul W. Guilford, one of the judges of Municipal Court of the city of Minneapolis, county of Hennepin, state of Minnesota, hereto attached and made a part hereof.

Dated....., 1942.

Robert Greenberg,
Attorney for Defendant,
1028 Northwestern Bank Bldg.,
Minneapolis, Minnesota.

Copy
No. 1724 — Petition Insanity, Inebriety, Feeble-Mindedness BC 1A Japs Olson Co.
Minneapolis—Class 2.

State of Minnesota,
ss. In Probate Court.
County of Goodhue.

In the Matter of the Alleged Insanity
of Eugene Goulet,

To the Honorable Wm. M. Ericson, Probate Judge of said County:

Your petitioner, the undersigned, Carl J. Jackson, respectfully represents to the Court and alleges that Eugene Goulet in said County:

(c) is of unsound mind; that such unsoundness of mind does not consist merely of such mental deficiency as renders him incapable of managing himself and his affairs and to require supervision, control and care for his own or the public welfare.

That your petitioner is related to said above named person as follows:

Superintendent Minnesota State Training School.

That the indications of insanity manifested by him are as follows: (Here give fully the symptoms on which the charge of.....is based)

goes into tantrums which requires holding, etc., tries to strike.

That the said alleged insane person will not appear in said Court voluntarily, and that it will be necessary to issue a warrant to bring.....before the Court.

Your petitioner states on information and belief as follows:

That said Eugene Goulet was born in Minneapolis; is about 19 years of age and the parent of no children.

That his residence and place of legal settlement is Hennepin County, Minnesota. (If not a resident of Minnesota, set out as fully as possible where h..... came from, how long.....has been in this State and in the County.)

46th and D Street—Robbinsdale, Minnesota.

That.....restraint has been employed.

That the supposed cause of insanity is injury in youth.

That patient has been treated by Dr. R. B. Graves.

That said person is the owner of and entitled to the following described property: None.

Wherefore, your petitioner prays that the above named Court will make due inquiry into the matter, and to that end that said alleged insane person may be brought into said Court and examined as to said alleged insanity, and if found to be insane that he be sent to a State Hospital in accordance with the statutes in such case made and provided.

C. J. Jackson.

State of Minnesota,

ss.

County of Goodhue.

Carl J. Jackson, being first duly sworn, deposes and says that he is the petitioner in the foregoing petition; and he knows the contents thereof, and

that the averments of said petition are true of his own knowledge, save as to such as are therein stated on information and belief, and that as to those he believes them to be true.

Carl J. Jackson.

Subscribed and sworn to before me this 11th day of June, 1942.

Wm. M. Ericson,
Probate Judge.

(Seal of Probate Court, Goodhue County, Minn.)

File No. 11220.

Copy Poucher, Minneapolis

No. 404—Form 233A

State of Minnesota,
ss.
County of Goodhue.

In the Matter of the Insanity of
Eugene Goulet.

1. (a) Date of birth 12-23-22.
   (b) Place of birth Minneapolis, Minn.
   (c) Single X Married....Widowed....Divorced.....
   (d) Number of children X.
   (e) Date of birth of youngest child X.

2. (a) Legal settlement at Robbinsdale, County of Hennepin, State of Minnesota.
   (b) Resident of Minnesota since birth.
   (c) Resident of Hennepin County since birth.

3. (a) Occupation Inmate State Training School.
   (b) Education 11th grade.

4. Religion Catholic.

5. Patient is entitled to care in an institution of the U. S. in Minnesota.

6. (a) Name of patient's father is Joseph Goulet.
   (b) Place of birth of patient's father Canada.
   (c) Maiden name of patient's mother Maria Ladue.
   (d) Place of birth of patient's mother Minnesota.

7. Patient's parents were not related to each other as first cousins.

8. The patient was committed by.....County Probate Court on.....1..... to.....State Hospital.

9. Date of onset and present symptoms of this psychosis. Since 1937 he has heard voices, has a description for each different voice.

   Gets spells with frothing at mouth, some twitching and then becomes violent. Remains unconscious for some time.

10. Psychosis appears to be increasing—decreasing —stationery. Increasing.
11. (a) The patient has not injured or threatened others.
    (b) The patient has never attempted or threatened suicide except by None on or about.....
    (c) Propensity to suicide is not present now.

12. (a) The patient has no filthy habits.
    (b) The patient is not destructive.

13. (a) The patient's father was not psychotic.
    (b) The patient's mother was not psychotic.
    (c) The following relatives of the patient were psychotic None.

14. Prior to the psychosis there were no peculiarities of personality reactions except None.

15. (a) The patient has been intemperate in the use of alcohol or habit forming drugs as follows: none.
(b) The patient's parents have been intemperate in the use of alcohol or habit-forming drugs as follows: None.

16. The patient has had no epilepsy: yes convulsions; none skull fracture; no syphilis; no other serious diseases.

17. (a) The patient has been confined in hospital .....Minnesota for.....days.
(b) The patient is suffering from no acute disease other than insanity except None.
(c) The patient's temperature is normal, pulse normal.

18. (a) Name and address of patient's spouse—nearest kindred — friend, Joseph Goulet, 46th and D Sts., Robbinsdale, Minn.
(b) Name and address of patient's family physician None.

19. Names of material witnesses at examination
C. J. Jackson
C. W. Swedenburg
School Records

From an examination of the patient and upon the evidence adduced at the examination we find the above named patient to be insane.

R. B. Graves, M.D.
S. H. Anderson, M.D.
Wm. M. Ericson, Probate Judge.

Dated June 12th, 1942.
(Probate Court Seal, Goodhue County, Minn.)

Copy.

No. 409 Warrant of Commitment and Superintendent's Receipt Pouchers, Mpls.

State of Minnesota,
ss. In Probate Court
County of Goodhue.

In the Matter of the Insanity
of Eugene Goulet.

To the Sheriff of Goodhue County, Minnesota, and the Superintendent of the State Hospital, Rochester, Minnesota.

The above named patient having been found to be insane, the said sheriff is commanded to convey and deliver such patient forthwith to the Superintendent of the State Hospital at Rochester, Minnesota, and the said Superintendent is commanded to receive and detain such patient in said hospital according to law.

Dated this 12th day of June, 1942.

Wm. M. Ericson,
Probate Judge.

(Probate Court Seal, Goodhue County, Minnesota.)

Receipt of Superintendent.

Receipt of the above named patient, a duplicate of this warrant, and a certified copy of the report of examination are hereby acknowledged.

Dated this 12 day of June, 1942.

Dr. B. F. Smith,
Superintendent.
per C. W. White, M.D.

(Receipt on original copy only.)

File No. 11220.

Endorsed—Filed this 15th day of June, 1942—Wm. M. Ericson, Judge of Probate. Recorded in Book 69 of Insanity Records, page 283.

Copy
Division of Public Institutions,
Carl H. Swanson, Director,
St. Paul, Minnesota.

Rochester State Hospital
Dr. B. F. Smith, Superintendent
Rochester, Minnesota.

July 28, 1942.

Hon. Wm. M. Ericson,
Judge of Probate,
Red Wing, Minnesota.

Dear Sir:

Eugene Goulet, Robbinsdale, Minnesota, committed from Goodhue County, June 12, 1942, was paroled to his father, Joseph C. Goulet, Robbinsdale, Minnesota, July 26, 1942.

Yours very truly,

B. F. Smith,
Medical Superintendent.

cl.

Copy
Wm. M. Ericson, Judge Al G. Rehder, Clerk

Probate Court
Goodhue County—Red Wing, Minnesota

State of Minnesota,
County of Goodhue. In Probate Court

In the Matter of the Insanity of
Eugene Goulet.

I, Wm. M. Ericson, Probate Judge of Goodhue County, Minnesota, do hereby certify that, regarding the above matter of Eugene Goulet, who was committed to the Rochester State Hospital on June 12th, 1942, as an insane person, there has been no proceeding or action stated in the above named Court relative to restoration to capacity.

Dated and done at Red Wing, Goodhue County, Minnesota, this 27th day of October, 1942.

By the Court:

Wm. M. Ericson,
Probate Judge.

(Backing Page)

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District

State of Minnesota,
Plaintiff.

vs.

Martin Kahner,
Defendant.

Notice of Motion and
Special Appearance

Service of the within is hereby admitted this 4th day of Nov., 1942.

Allen L. Rorem,
Asst. Co. Atty.

To be heard Monday
9 A. M., Nov. 9, '42.

Time allowed to file Briefs

Robert Greenberg,
Attorney at Law,
1028 N. W. Bank Bldg.,
Minneapolis, Minn."

The above motion came on for argument before his Honor Judge Luther Youngdahl on the 9th day of November, 1942, and our motion to quash and set aside the indictment was denied. The following is a copy of Judge Youngdahl's order:

"State of Minnesota, District Court,
County of Hennepin. Fourth Judicial District.

State of Minnesota,
Plaintiff,

vs.

Martin Kahner,
Defendant.

Order. No. 37853.

A motion to quash the indictment in the above matter came on for hearing before the undersigned,

one of the judges of the above named court, on the 9th day of November, 1942.

Robert Greenberg appeared in behalf of the defendant; and William Gunn, assistant county attorney, appeared in behalf of the State.

After hearing the arguments of counsel, and upon the briefs submitted, and upon all the files and proceedings herein,

It is ordered that said motion be and the same is hereby in all things denied.

Dated November 10, 1942.

By the Court:

Luther Youngdahl,
Judge.

Memorandum.

Although the authorities are not entirely harmonious, the general rule is that the Court will not quash an indictment for the reason that the grand jury received improper evidence or examined incompetent witnesses. (31 Corpus Juris on Indictment and Information, Section 385, page 808.)

This rule has been adopted by our Court in State vs. Marshall, 140 page 363.

Let this memorandum be made a part of the foregoing order.

Luther Youngdahl.

Filed Nov. 10, 1942.
Geo. H. Hemperley, Clerk.
By S. B. Reamer, Deputy."

As this Court can see from the above order, Judge Youngdahl was clearly of the opinion that the testimony of Goulet was wholly incompetent, but it was his further contention that the names of other witnesses appeared on the indictment, whose testimony may have been competent, and therefore he was presented with the proposition of law where a Grand Jury receives both competent and incompetent testimony and therefore under some authorities in such a case where a grand jury receives both competent and incompetent testimony, the indictment will be allowed to stand.

It was our contention before Judge Youngdahl that the other witness, listed in the indictment knew nothing of the facts in this case and testified only as to technical matters, and we offered to show what each one would have testified to, as they testified in the case in Municipal Court, but the Judge held that under the decision of our Supreme Court, such testimony of witnesses before a Grand Jury is of a confidential nature and could not be disclosed, and left the question as to whether or not there was any other competent testimony before the Grand Jury to be decided by the trial judge at the time of the trial before a Court and Petit Jury.

In numerous other states in the union the rule is otherwise. See, for example, the leading case of

Royce v. Territory, 5 Okla. 61, 47 Pac. 1083,

which was also a case where the defendant being indicted of the crime of embezzlement, filed his motion in said case to set aside and quash said indictment on the ground that the said indictment was based solely upon incompetent testimony, and for an order to take testimony thereon. The lower court refused to make such an order, or set a date for taking testimony and allowed the indictmen to stand. Upon the trial of the case, the defendant

was convicted and he appealed to the Supreme Court of the State of Oklahoma. The Supreme Court of Oklahoma in the above case, reversing the lower court said on page 65 as follows:

> "At the common law, an indictment is invalid and may be quashed when it is found and returned by a grand jury not legally constituted or where there was no legal evidence before the grand jury, upon what it was based; and this invalidity might be shown upon a plea of abatement. The proceedings of a grand jury cannot ordinarily be disclosed; but the rule is not to be carried to the extent of obstructing justice or creating wrong and hardship. A Court may inquire into the evidence upon which a grand jury has found an indictment and if such evidence is plainly illegal and incompetent should quash the indictment."

The Court here quoted the following cases supporting its decision:

People v. Restenblatt, 1 Abb. P. 268;

Rice on Evidence, 411;

Bishop on Criminal Procedure, Sec. 764;

State v. Grade, 12 Mo. App. 361;

U. S. v. Kilpatrick, 16 Fed. Rep. 765.

In our brief attached to this petition we shall review in detail for this Honorable Court the above decision.

The above Court further said on page 69:

> "We think the motion and application to take testimony presented a right to be heard upon the motion showing the invalidity of the indictment, that it was a substantial right of the defendant to be allowed to establish facts stated in such motion for the purpose of showing that he was about to be tried **without due process of law.**

"The importance of the proposition involved may be appreciated when it is considered that the defendant had no other way to have the question presented to the attention of the Court or considered by it; as under our statutes, it could not be presented either upon a motion for new trial or upon a motion in arrest of judgment. (The same is true under the statute of the state of Minnesota, as we shall point out hereafter in our brief attached to this petition.) Hence if it be not substantial error for a trial court to summarily overrule a motion to set aside and quash an indictment, based upon the grounds stated in this motion, and to arbitrarily refuse to comply with the statutes and permit the defendant to produce evidence showing its invalidity, then the **constitutional right** of one accused of crime may be taken from him and he may be held to answer to a capital or otherwise infamous crime without a presentment or indictment of a grand jury. The constitution in guaranteeing this right to persons accused of crime did not mean a mere form of indictment, but meant a valid indictment found and presented in accordance with the ancient and just rules and safeguards of law, provided for the organization, action and conduct of grand juries."

After the lower court denied our motion as mentioned above, a date was set for trial of this case and the case was tried commencing on February 4th and was concluded on February 16, 1943. At the trial the defendant waived a jury and the case was tried by his Honor Judge Selover without a jury.

At the very beginning of the trial we again renewed our motion to quash the indictment on the ground that it was based entirely upon the illegal and incompetent testimony of an insane person, but this motion was again denied by the trial court.

We then proceeded to trial of the case upon the merits and upon conclusion of the State's case, after all of the

witnesses for the State had testified in the case, and that included every witness who was listed in the indictment who had appeared before the Grand Jury, we again renewed our motion to quash the indictment and dismiss the case on the grounds that the indictment was based wholly upon illegal and incompetent testimony, to-wit: the testimony of a duly adjudicated insane person.

For the information of this Court, in order that it may have a thorough and clear understanding of the important details involved in this motion, we shall here list the names of the witnesses as listed in the indictment and a concise summary of their testimony before the trial court. The witnesses were as follows:

1. Earl Howard
2. Charles Budd
3. Mrs. Dorothy Goulet
4. Eugene Goulet
5. Joseph Hadley
6. R. Peterson
7. Russell S. Ackerman
8. C. F. Comstock.

The above are all the witnesses who had appeared before the Grand Jury and upon whose testimony the indictment was predicated against the defendant. Each of the above witnesses testified as follows:

"1. Earl Howard is a deputy clerk in this court and had something to do with the issuing of the complaint, but he wasn't called to testify in this case.

2. Charles Budd is a deputy sheriff who testified the he served the subpoena on the father. Joseph Goulet is the father and the court will recall his testimony very clearly to the effect that he never saw this defendant until he saw him in the courtroom during the first or second day of the trial.

3. Mrs. Dorothy Goulet is the mother of Eugene and the wife of Joseph and she wasn't called in this case. No doubt had she been called, she would merely have in some respects corroborated Joseph's and Eugene's testimony as to the visit to her house of Mr. Garon and Mr. Buckley on the 14th day of October.

4. Eugene Goulet, of course, is the complaining witness, and we contend that he was the only one who testified before the grand jury as to a transaction of any kind whatsoever with this defendant.

5. Joseph Hadley is the assistant city attorney and the court will recall very vividly that he testified as to the statements taken from Eugene Goulet, and further that Mr. Hadley specifically testified that he had no dealings whatsoever with Mr. Kahner in reference to this case.

6. R. Peterson was not called in this case, but we know that he is the deputy in the register of deeds office who merely testified to the fact that the Minnesota Tavern Corporation is a corporation. We might state for the benefit of the court that we are familiar with this very fact because Mr. Peterson was called as a witness in the Palms case, tried before Judge Guilford, and he there testified that the Minnesota Tavern Corporation is a corporation and records so show in the register of deeds' office.

7. Russell S. Ackerman testified to the effect that a liquor license was duly issued from his office to the Minnesota Tavern Corporation and the court will no doubt recall that in the application, the officers of the corporation are set out and defendant's name was not in any way mentioned or did he appear to be in any way connected with the said corporation.

8. E. F. Comstock testified, as the record shows that he saw this defendant and Eugene Goulet come

out of Mr. Garon's office in the Midland Bank Building, get into an elevator, and in the elevator he overheard a conversation to the effect that this defendant asked Eugene Goulet whether he wanted a ride home, and if so, he would give him a ride home in defendant's car, that when they got downstairs outside the building Comstock took Goulet by the arm down towards the court house."

With the above established facts before this Court as a basis for quashing and setting aside the indictment, is there any question in the mind of this Court but that the indictment was based entirely upon the testimony of Eugene Goulet, who was an insane person, and therefore said indictment was invalid, contrary to the statutes of the state of Minnesota, contrary to Article V of the Constitution of the United States and contrary to the Fourteenth Amendment of the United States Constitution, and being obtained wholly without due process of law, and having so been obtained, deprived this defendant of his rights and liberty so guaranteed by the United States Constitution.

In our brief hereinafter attached to this petition, we shall point out more in detail the statutes of the state of Minnesota which deal with the kind of evidence that may be presented before a Grand Jury for them to consider before issuing an indictment.

Upon conclusion of the trial, the lower court found this defendant guilty of the charge set out in the indictment and sentenced him to six months in the county jail of Hennepin County, said sentence being the maximum sentence under our statutes.

After this sentence, defendant was granted a stay for the purpose of making a motion for a new trial, and in case such motion was denied, the stay was to continue, for the purpose of giving this defendant an opportunity

to appeal to the Supreme Court of the State of Minnesota.

In proper time defendant did make a motion for a new trial setting out numerous assignments of error that occurred at the trial and among such assignments set out as one of the grounds of error the fact that this Court erred in not quashing and in not setting indictment aside, same being based wholly upon illegal and incompetent testimony.

Among our numerous assignments of error, there were two concerning the validity of the indictment which were as follows:

Assignment of Error III (R. p. 386):

> "That the Court erred in denying this defendant's motion to quash the indictment made after the opening statement of Mr. Larson, on the ground, as shown by defendant in his motion, that this indictment was illegal and was obtained solely upon the testimony of an insane person, and being so obtained, the said indictment was obtained without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States of America, contrary to the Constitution of the state of Minnesota, and contrary to the statutes of the state of Minnesota in such case made and provided."

And Assignment of Error XXIII (Subd. t of printed record, pages 415, 416), which was as follows:

> "The Court further erred, when upon the closing of the State's case, the Court denied the following motion made by counsel for defendant:
>
> Mr. Hughes: I think I am going to make some motions—at this time the defendant desires to renew his motion to quash and set aside the indictment, upon the ground that it now clearly appears that said indictment is based entirely upon incompetent testimony, to-wit: the testimony of Eugene Goulet, who was, and as a matter of fact still is, adjudicated

an insane person and was so at the time the testimony before the grand jury was given, and he now is at the present time.

(Argument.)

Mr. Hughes: We again at this time renew our motion to set this indictment aside; we move to quash same upon the ground—

Mr. Larson: I think the court has ruled—

Mr. Hughes: I would like to have the court rule on the motion to quash.

The Court: I have already ruled, and I think I will adhere to it; the motion to quash, is denied."

The motion for new trial was duly argued on August, 1943, and on August 28, 1943, his Honor Judge Selover denied said motion for new trial and defendant then perfected his appeal from said order to the Supreme Court of the State of Minnesota.

In our appeal to the Supreme Court of the State of Minnesota we again set out in our brief all the assignments of error as set out in the lower court and amongst them great stress was laid upon assignment of error III mentioned hereinabove on page 26 of this petition, and assignment of error XXIII mentioned on page 26, both assignments dealing specifically with the validity of the indictment and with the fact that said indictment was obtained in violation of the right of this defendant under Article V of the Constitution of the United States and in violation of the Fourteenth Amendment of the Constitution of the United States.

The matter came on to be heard before the Supreme Court of the State of Minnesota on the 17th day of April, 1944, and on the 16th day of June, 1944, the Supreme Court of our State filed its written opinion affirming the trial court in its holdings.

We felt aggrieved at the conclusions reached by our Supreme Court in its opinion, as we shall hereinafter

point out in our brief hereto attached, and we desire to state at this particular time that in its written opinion the Supreme Court of the State of Minnesota wholly ignored the very important question squarely and specifically presented to it for its determination, namely, whether an indictment based solely and entirely upon illegal and incompetent testimony of an insane witness may be allowed to stand in a court of justice, in contravention of the constitutional rights and liberty of a defendant, who is brought to trial under such a defective indictment.

In dealing with the validity of an indictment based wholly upon incompetent evidence presented before a grand jury, namely the testimony of an insane person, who is declared incompetent as such a witness by our statutes, our Supreme Court said in its opinion, par. 2, page 7, as follows:

> "We shall assume, without so deciding that the motion to quash the indictment properly raises the question that it was based upon the claimed to be incompetent evidence of Goulet."

And in the very next statement following the above sentence, wherein it is clearly admitted by our Supreme Court that Goulet's testimony was incompetent, they refuse to state or commit themselves as to whether such incompetency will invalidate an indictment. Instead of dealing squarely with the question before it, they wholly ignore it and also ignore the rights that this defendant or any other defendant has under the Constitution, to-wit: to be tried only upon an indictment that is based on legal and competent evidence only.

Following the above statement as to the motion to quash made in the lower court, our Supreme Court says as follows:

> "The question of his competency was properly raised at the trial. Under Minn. St. 1941, Section 595.02(6), (Mason St. 1927, Section 9814[6]), 'persons of unsound mind' are incompetent as witnesses. In order to constitute grounds for excluding the witness' testimony, the mental incompetency must exist at the time he is offered as a witness. The determination of the competency of a witness is for the trial court. Where the competency of a witness is challenged upon the ground of unsoundness of mind, the trial court should, as it did here, conduct a preliminary inquiry to enable it to determine the fact of the witness' competency."

The question before the Supreme Court of Minnesota with reference to the motion to quash is not the mental condition of Goulet at the time of the trial of this case but his condition long before the trial of the case, to-wit: at the time he was offered by the county attorney as a witness before the Grand Jury on October 20, 1942. On that day the undisputed fact is, by legal adjudication and by the Supreme Court's admission, that Goulet was a duly adjudicated insane person. The records attached to the motion are conclusive, as to this.

When Goulet was taken before the Grand Jury of Hennepin County to testify as to whatever dealing he may have had with this defendant, he was before such jury as an adjudicated insane individual. Before being taken into the Grand Jury room to testify, he was examined by no one as to whether he understood the value of an oath or could distinguish between right and wrong. These facts stand admitted and undisputed. So for all purposes, we have an insane man before a Grand Jury, his testimony being wholly incompetent and illegal both by statute and common law, and the rights and liberties of a citizen are attempted to be deprived through a trial based upon such an indictment.

With our above statement, our Supreme Court agrees, for they said at the bottom of page 8 as follows:

> "His competency (meaning Goulet) as a witness depended upon his mental capacity at the time that he was offered as such."

What was his mental capacity when he was offered as such witness before the Grand Jury? The documents attached to the motion to quash, and which documents were before the Supreme Court of the State of Minnesota, and which documents are set out in this petition, speak for themselves.

In the eyes of the law and in the eyes of the world, the witness Goulet was an insane person, and consequently an incompetent person to testify before the Grand Jury.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

There are special and very important reasons why a review on a writ of certiorari should be granted in the sound discretion of the Court. In addition to the facts and argument submitted in our petition and brief, we urge further:

That the question presented to the Court herein is of utmost importance to every liberty-loving citizen who loves and respects our Constitution; and such question has never been decided by our Supreme Court.

That the State Supreme Court of Minnesota has decided a federal constitutional question of substance in a way not in accord with the applicable decisions of this Court.

Wherefore your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Minnesota, commanding that Court to certify and send

to this Court for its review and determination a full and complete transcript of the record and all proceedings in the said Supreme Court had in the case numbered and entitled in its docket—33675.

State of Minnesota vs. Jacob Garon and Martin Kahner to the end that the decision and judgment of said Supreme Court of the State of Minnesota may be reviewed and reversed by this Honorable Court and that judgment may be entered on behalf of this petitioner.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

MARTIN KAHNER,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF CASE

The facts of this case are, we believe, stated adequately in the foregoing petition for writ of certiorari.

The controlling and most important question in this case is a federal question involving the rights and liberties of a United States citizen under Article V and under the Fourteenth Amendment of the Constitution of the United States.

ARGUMENT

We have already pointed out to this Court, in our petition for the writ of certiorari, that it has been the contention of this defendant, during the lengthy trial of the lower court and in the appeal to the Supreme Court of the State of Minnesota, that an indictment based entirely upon evidence submitted to a grand jury by a complaining witness who is insane, is illegal, void and contrary to

Article V as well as the Fourteenth Amendment of the Constitution of the United States. And it has been, and is, our further contention that when a court of justice permits such an indictment to stand, and a defendant is forced to go to trial under such an indictment, that he is being deprived of his constitutional guarantee under the Fourteenth Amendment to the Constitution of the United States, and is deprived of his rights, life and liberty without due process of law.

We have already mentioned in our petition for writ of certiorari some of the authorities upholding our contention, and in this brief we shall attempt to point out to this court a few additional authorities, both state and federal that uphold our contention.

The law seems to be very specific and very clear throughout the entire country that an indictment based entirely upon incompetent evidence is wholly invalid and should be quashed. There is statutory as well as common law in nearly every state of the union which defines the kind of evidence that may be presented for the consideration of the Grand Jury.

In our own state, Section 10622 of Mason's Minnesota Statutes, dealing with what kind of evidence should be presented to a grand jury there is the following:

> "EVIDENCE—FOR DEFENDANT — In the investigation of a charge for the purpose of indictment or presentment, the grand jury shall receive no other evidence than—
>
> 1. Such as is given by witnesses produced and sworn before them; and
>
> 2. Legal, documentary, or written evidence.
>
> They shall receive none but legal evidence, and the best in degree to the exclusion of hearsay or secondary evidence, except when such evidence would

be admissible on the trial of the accused for the offense charged."

Section 9814, dealing with competency of witnesses, is in part as follows:

"Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as follows:

* * * * *

6. Persons of unsound mind; persons intoxicated at the time of their production for examination, and children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly, are not competent witnesses."

The first five paragraphs under the above statute, dealing with what witnesses are not competent, merely refer to such matters as (1) where a husband cannot be examined for or against his wife without her consent, and vice versa, and (2) that an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, etc., and (3) deals with the privileged communications of clergymen, and (4) deals with the privileged relationship between a physician and his patient, and (5) provided that a public officer shall not be allowed to disclose communications made to him in official confidence when the public interest would suffer by the disclosure, and (6), of course, is as set out above.

The courts throughout the country uniformly hold, as, of course, does our own court, that an insane person is an incompetent witness and his testimony is illegal. The above rule is modified to some extent by all the courts, who also uniformly hold that if such a person who is of unsound mind is presented as a witness in a jury or court

case, and his sanity is questioned, then in that case, it becomes the duty of the court, before allowing such witness to testify, to inquire into his condition, to ascertain whether or not he can distinguish between right and wrong; whether he can understand the value of an oath, and if after such careful inquiry the court is then of the opinion that the witness has understanding of those facts, then he may be allowed to testify, but his testimony and its credibility are questions for the jury to decide.

In connection with the above statement of law, namely: that an insane person is prima facie an incompetent person, unqualified to take an oath, we desire to call the court's attention to the situation existing in the case at bar. In the case at bar, the complaining witness, being at the time insane, was taken before the grand jury, sworn, and his testimony was then and there taken without any effort made by anyone to see whether such insane witness could even understand the value of an oath or could distinguish between right and wrong. We presume that the county attorney who produced such a witness before the grand jury will argue that he had no knowledge or information that the said Eugene Goulet, the witness, had been adjudicated insane, but, of course, that is no excuse for submitting illegal and incompetent evidence before a grand jury.

Based solely upon such testimony, the grand jury brought in its indictment against this defendant and we are now asking the court to correct the injustice done to this defendant and to quash and dismiss this indictment.

We do not believe that it should be necessary for us to quote many authorities to substantiate our position that an insane person is an incompetent person to testify and upon whose testimony an indictment should be based, and to the further proposition that only legal and com-

petent testimony should be submitted to a grand jury for the purpose of bringing in an indictment.

However, we have checked the authorities and are pleased to submit herewith a few cases that hold in accordance with the above statements of law.

Courts in guarding the rights of individuals have gone so far as to hold that an insane person cannot even make an affidavit and that an affidavit so made by an insane person has no evidentiary value at all and is wholly void.

In **Smoot on Insanity,** page 553, paragraph 607, is the following statement of the law:

> "Since the testimony under oath of an insane person cannot be received, it logically follows that such a person **can not** make a sworn statement in the **form of an affidavit.** Such a solemn act would be vain, when the affiant did not understand or appreciate what he was doing, and the value of the facts contained in it, would have little, if any, force. **Where** such an **affiant** has been adjudged insane and confined in an asylum, it has been held that **such an affidavit so made by him will be void,** unless the jurat or the officer taking the affidavit, states that the affiant has been examined as to his sanity and found competent to make the affidavit."
>
> **Spittle v. Walton,** L. R. 11 Eq. 420, 40 L. J. Ch. (U. S.) 368. In re Christie J. Page (N. Y.) 242.

The same author in the above work on Insanity, on page 247, Section 306, states the law to be as follows:

> "Since the insane person is incapable of making an affidavit, as we have seen, for the reason that such disability would necessarily follow as a corralory to his disqualification as a witness, it has been held that **he may not make complaint,** as a basis for criminal prosecution. One who is without reason and discretion could not be allowed to judge the expediency of initiating so important a matter as criminal prosecution that might taint another with infamy. It is therefore held that **the complaint** and all proceedings held thereof would be void."

In the case of **Martin v. Hover,** 60 Mont. 302, 199 Pac. 694, it is held that where an incompetent person signs an affidavit, it has no evidentiary value.

Also in the case of **State v. Smith,** 26 Wash. 354, or 67 Pac. 70, the court while affirming a conviction of robbery, where the witness appeared to be in a state of mental collapse, said:

> "The record shows that on the same day the verdict of the jury was returned, the prosecuting witness was duly adjudged to be an insane person, and was duly committed to the asylum for the insane. **It is manifest therefore** that he was laboring under the same disability when he was upon the witness stand, and he was for that reason an incompetent witness. His testimony must therefore be entirely eliminated."

In the case of **Lee v. State,** 43 Tex. C. R. Rep. 285, 64 S. W. 1047, it was held that the female named in the indictment which charged the accused with rape in having had carnal knowledge of a female being so mentally diseased at the time as to have no will to oppose the act, was an incompetent witness to prove the corpus delecti of the offense charged, especially when the statute provided "that no person could testify who were in an insane condition of mind when the events happened of which they are to testify.

Again in one of the leading cases of the country, namely: **State ex rel. Yelek v. Jahlik,** 66 Kan. 301, 71 Pac. 572, 61 L. R. A. 265, Chief Justice Johnson of the Supreme Court of Kansas in dismissing a case based upon the affidavit and complaint of a lunatic said as follows:

> "Having no mind or understanding there was in fact no complaint. The arrest and prosecution of a person on the initiative of one mentally irresponsible is beyond reason * * * and since the incapacity of the complaint is conceded * * * the proceeding was null and void."

It has also been held that where evidence of a witness' insanity is introduced later in the case, the court may instruct the jury that if they found the witness to be insane, they should disregard his testimony entirely. **Bowdle v. Detroit Railway Co.,** 103 Mich. 277, 61 N. W. 529, 50 Am. St. Rep. 366.

It has been held in this connection, that the testimony of such a witness will not be received where uncorroborated. For example, it is held that the uncorroborated testimony of an idiot will not be sufficient as a basis for conviction of a crime. **People v. Desschere** (N. Y.), or 69 App. Div. 217, 74 N. Y. S. 761.

In connection with the above authority, we believe that it is well to mention and point out to the court at this time that in the case at bar, the only witness who confronted this defendant on this accusation is the complaining witness, Eugene Goulet, who, as we have already seen, was at the time he was supposed to have had some conversation with this defendant, about his leaving the state, insane, was insane at the time he testified before the grand jury and is at this moment still insane. It is upon such testimony and such testimony alone that the State in this case prosecuted this case against the defendant.

In concluding the authorities on the testimony of insane person, we desire to call the court's attention to a well written note in 28 L. R. A. 318, where we find the following statement of the law:

> "If the prosecuting witness is incompetent to testify or prosecute, the indictment will be invalid if objected to in time."

In connection with the other proposition of law, namely: the proposition that evidence before a grand jury shall be **competent and legal and only that,** we at

this time desire to call the court's attention to a few authorities on that subject:

In a well written opinion in the case of **U. S. v. Kilpatrick,** 16 Fed. 765, p. 771, Justice Dick stated the law as follows:

> "Investigations before grand juries must be made in accordance with well established rules of evidence, and they must have the best legal proof of which the case admits. In this respect **they are judicial tribunals.** The prosecuting officer is presumed to be familiar with the rules of evidence and **it is his duty to take care that no evidence is received** by the grand jury which would not be admissible in a court upon the trial of the cause. Citing Wharton Criminal Law, Sec. 493."

The author of the above note states the general rule to be as follows:

> "In accordance with the uniform rule of law, recognized by statute, that a grand jury ought to receive only competent legal evidence (and that's the rule in our state) (20 Cyc. 1346), it seems that, in some jurisdictions, while the court cannot inquire into the sufficiency of the evidence before a grand jury, **it may inquire into the legality of such evidence,** and if it is plainly illegal and incompetent, as a whole, should quash the indictment."

Now that was exactly our contention all the way through our case, both before the case was tried and after it was tried. We couldn't very strenuously quarrel with the lower court's ruling when before the trial of the case the court said that it could not go into the testimony that was presented before the grand jury, the court holding that although the testimony of Goulet was plainly incompetent, there may have been other competent testimony by other witnesses.

But, after the completion of the trial, when every witness who had appeared before the grand jury had also appeared before the lower court and testified, it was very clear to the court, that there wasn't one single word of evidence by any one of these witnesses upon which an indictment could have been based, outside of the statements of Eugene Goulet, and it is our contention, that when the lower court realized that, it should have granted the motion of defendant to quash the indictment, and our Supreme Court should have corrected the lower court's error.

In the case of **Boyce v. Territory,** 5 Okla. 61, 47 Pac. 1083, quoted by the author of the above note as one of the leading cases in the country, the court holds in the syllabus as follows:

> "Article V of the Constitution of the United States, providing that 'No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,' does not mean an accusation in the mere form of an indictment, but does mean a presentment or indictment found and returned by a grand jury legally selected, impaneled and sworn, and upon **competent evidence** as authorized by law; and a trial of a person for such crime without an indictment thus found and returned is in violation of his constitutional right and void."

The court, on page 65, said, as follows:

> "The proceedings of grand juries cannot ordinarily be disclosed, but this rule is not to be carried to the extent of obstructing justice or creating wrong and hardship. A court may inquire into the evidence upon which a grand jury has found an indictment, and if such evidence is plainly illegal and incompetent, should quash the indictment." Citing the following cases:
>
> **People v. Restenblatt,** 1 App. Pr. 268;

Rice on Evidence, 411 Bishop's New Criminal Procedure, Vol. 1 En. 764;
State v. Grady, 12 Mo. App. 361;
U. S. v. Kirkpatrick, 16 Fed. Rep. 765.

This Kirkpatrick case we have already quoted above. Our contention in this case is exactly as set out by the above court, namely, when the lower court heard all the evidence of other witnesses that appeared before the grand jury and found out that Goulet's testimony was the only testimony upon which an indictment could have been based, and his testimony because of his insanity being incompetent, should have quashed the indictment.

> It is very interesting to note that as early as 1855, when there was little precedent for some phases of our law, that judges very zealously guarded the rights of individuals indicted by grand juries. We believe that this Court will find very enlightening, along these lines, the case of **People v. Restenblatt,** 1 App. Pr. 268 (N. Y.), supra, decided in 1855.

The above case was also a case which came up upon motion to quash an indictment. The motion to quash in that case was based upon the sufficiency of the evidence before the Grand Jury, instead of the competency of the evidence as involved in our case. Although the grounds for quashing are different, the principles of law involved are identical.

The above New York court, after setting out the grounds for the motion to quash said, as follows:

> "And now, upon this state of facts (given preliminarily, for a better view of the case), the Court is moved to go behind the indictments and take judicial notice of this want of proof for the purpose of setting them aside; thus raising the question, both new and important, whether a criminal court can pass behind the record to learn if there was any proof before the grand inquest, going to establish the

offense alleged, with a view to quash an indictment, lawful in its composition, in accordance with the rules of pleading, and imparting absolute verity on its face. The criminal books afford almost no authority for the exercise of such a power, and I cannot find a precedent among adjudicated criminal cases either in this country or England for so bold an intrenchment of the heretofore scarcely disputed right of a grand jury to indict whom they pleased, when they pleased, how they pleased and for what they pleased, with proof or no proof as they pleased, defying the Court of which they are less than a coordinate branch against all review of their acts, however demanded by the rights of the citizen, or needed for ends of public justice; nor yet is there any decision involving a principle of law or rule of criminal procedure going to interdict such innovation when prudently resorted to for the attainment of truth and the administration of that justice which is the right of all men."

After discussing various phases of the case, the Court again said on page 271 as follows:

"It is in my judgment quite enough that a grand jury is licensed to act in secret upon exparte testimony in respect to all matters and persons, without permitting them to indict individuals contrary to the rules of law, and where no crime has been proved, as for instance, a witness testifies before the Court and jury; a spectator hears a bystander say that the evidence is corruptly false; upon this the spectator goes before the grand jury now in session and swears that the witness testified to something which he believes to be utterly false, as a citizen standing by said it was so; and upon this an indictment is ordered for perjury. Is there no relief in such a case except a public trial? Can not courts through facts appearing quash the indictment for insufficiency of proof? If not why not? The only answer is that there is no authoritative precedent. If not, it is time for one; for if controlled by nothing else, grand

juries should be bound by the rules of evidence, for upon this more than anything else, depends a citizen's safety. In the case of Dr. Dodd (& Leach C. L. 184), when the defendant was called upon to plead, he challenged the validity of the indictment upon the ground that it was found upon the testimony of incompetent witnesses. The Court entertained the objection. The matter was argued by some of the most able lawyers at the English bar before the twelve judges, and it was only because that they decided that the evidence was legal and the witnesses competent that the objection failed."

The Court in the above New York cases, after quoting further principles of law then ordered the indictment to be quashed.

Another well written opinion dealing with the rights of courts to scrutinize indictments brought in by grand jurors, and if possible to prevent miscarriage of justice, is the case of **State v. Grady, supra,** where the learned Missouri court said on page 363:

"The common law rule of secrecy was formerly enforced with a strictness wholly unknown to the more recent adjudications. It was long held that no one should be heard, under any circumstances to impeach or impugn the propriety or regularity of a grand jury's proceedings. **United States v. Brown,** 1 Sawyer 531. But the later which recognizes **personal constitutional rights, as superior to every other consideration,** is now well established, that whenever it becomes essential to the ends of justice, or to constitutional supremacy, to ascertain what has occurred before a grand jury, it may be shown, no matter by whom, the only limitation being that it may not be shown how the individual jurors voted, or what they said during their investigations (quoting the following cases)":

Burdick v. Hunt, 43 Ind. 381;

Sikes v. Dunbar, 2 Wheat. Sel. N. P. 1091;

Hindelkoper v. Cotton, 3 Watts 56;
Thomas v. The Commonwealth, 2 Rob (Va.) 795;
The State v. Fasset, 16 Conn. 457;
The Commonwealth v. Hill, 11 Cush. 137;
The State v. Broughton, 7 Ired. 96;
Way v. Butterworth, 106 Mass. 75;
The People v. Shattuck, 6 Abbott N. C. 34;
The Commonwealth v. Mead, 12 Gray 167.

The judgment in this case was properly reversed.

In the case of **People v. Acritelli,** 57 Misc. 574, 110 N. Y. Sup. 430, which is a lengthy and well written decision on a motion to quash an indictment and which motion was quashed, the court said, beginning on page 597 as follows:

> "An indictment may, moreover, be set aside because of the reception by the grand jury of **illegal** or incompetent testimony.
>
> "The statute provided (as does our statute) that the grand jury can receive none but legal evidence. Code Criminal Law. Pro. § 256. (See our statute 10622.) While in the absence of proof to the contrary, the presumption is in favor of the legality of the proceeding of a grand jury, where the minutes of the testimony taken before the grand jury are before the court, as in the case on this motion, the motion is to be determined on such evidence and not on presumptions. The section referred to in effect requires that investigations before grand juries shall be made in accordance with the established rules of evidence and that the evidence received shall be **competent legal** evidence, namely, such as is legitimate and proper before a trial jury. Although this section, as well as some others in its immediate context is primarily intended as a rule for the guidance of the grand jurors, for the conscious violation of which they can perhaps be at least admonished by the court, its secondary and

> more useful purpose is to safeguard the **inherent** and constitutional rights of the citizen in his contact with judicial proceedings. As so considered, it declares a rule for the violation of which his injury an individual, under certain circumstances, may obtain redress. This redress is afforded by granting a motion to dismiss an indictment when it appears to the court by competent evidence that the indictment is founded solely upon illegal evidence or to such an extent upon illegal evidence as to indicate that the indictment resulted from prejudice or was found in wilful disregard of the rights of the accused."

In line with the above authorities, we desire to call the court's attention to the leading Minnesota case on the question of competency of evidence before a grand jury upon which an indictment may be based, namely: the case of **State v. Marshall,** 140 Minn. 363, 168 N. W. 174.

The above Minnesota case holds squarely with the proposition that we have been contending for throughout this case that our motion to quash the indictment should have been granted because it was based entirely on the incompetent evidence of the complaining witness, Eugene Goulet, who at the time that he testified before the grand jury, was duly adjudicated insane and therefore was incompetent.

In dealing with the nature and kind of evidence that a grand jury may hear for the purpose of bringing in an indictment our court in the above case, first paragraph on page 365 said:

> "A grand jury in the investigation of a charge for the purpose of indictment or presentment can receive none but legal evidence. G. S. 1913-1917."

In the above case, it appears that in a prosecution for adultery, the husband, without the consent of the wife, was one of the witnesses before the grand jury, who

brought in the indictment. The court held that such testimony was incompetent, but held further that there was other competent testimony before the grand jury upon which this indictment might have been based, and laid down the general rule which is in accord with the weight of authority throughout the country, that an indictment based **partly** on incompetent evidence is invalid and cannot be quashed upon motion. Here our court quotes with approval the well written note in the case of **Noll v. Dull,** 47 L. R. A. (N.S.) 1207, and cases cited therein.

But in the case at bar it is the contention of the defendant that this indictment is not based on only **part incompetent** testimony, but is based **entirely** on the incompetent testimony of the insane witness Eugene Goulet. As we have already pointed out above, when we analyzed the testimony of each and every witness who appeared before the grand jury, there wasn't **one single witness** who knew anything about any act of defendant Kahner in this case that might lead to an indictment, and it is just as clear as it can be that the indictment against the defendant was based solely upon the testimony of the insane witness Eugene Goulet.

Our Supreme Court in the above Marshall case realized the possibility that an indictment could some time be based **entirely** on incompetent evidence before a grand jury—just as we are contending here—and intimated in very emphatic language that an indictment so brought about would be invalid.

At the bottom of page 365 our court said as follows:

> "It does not appear in the case at bar that there was not ample evidence outside of that of the husband to warrant the indictment. It only appears that he was one of several witnesses examined, and from the form of the question reported to us, that the indictment was based in part upon his testimony."

In other words, our court intimated very clearly, in the above quotation that had it appeared in the above case that there wasn't ample other evidence outside of that of the husband, that the indictment would have been invalid.

In our case that is exactly what we are contending and we believe that we have proved, beyond a shadow of a doubt, by analyzing the testimony of every witness who appeared before the grand jury and as given at the trial, that the indictment was based solely on the testimony of the witness, Eugene Goulet, and could not under any circumstance be based upon even **one** word of other testimony. Therefore, under the rule of the **Marshall case, supra,** we believe that upon the conclusion of our case in the lower court, when it was pointed out to the court that this indictment could not have been based upon any other testimony except that of Eugene Goulet, the insane witness, the court should have quashed the indictment and when this matter came before our Supreme Court, this Court should have met this issue squarely, instead of evading it, and should have reversed the lower court.

Our Supreme Court in the above **Marshall** case realizing that at some time or other it could be confronted with the proposition where an indictment might be based solely upon incompetent evidence, left that question open, when it said on page 366:

> "We decide only the question before us, and not what would be the law in some other situation."

We believe now that we had before our Supreme Court in the case at bar the "other situation" that our court mentioned above, namely the proposition of an indictment brought in by the grand jury based entirely upon **incompetent** evidence. Under the authority of the above

case, we believe that the lower court should have quashed the indictment, and in not doing so it was in error and the Supreme Court should have corrected that error.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant the writ of certiorari to review the final judgment herein of the Supreme Court of the State of Minnesota in the above entitled action.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1944

No. 478

MARTIN KAHNER,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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REFERENCE TO THE OFFICIAL OPINION OF THE COURT BELOW.

The decision in this case was handed down by the Supreme Court of Minnesota on June 16, 1944. It is reported in 15 N. W. 2d, 105. It is not yet published in the Minnesota State Reports.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

Appellant attempts to invoke the Fifth Amendment to the United States Constitution, which applies only in and to the federal courts.

Appellant attempts to invoke the Fourteenth Amendment. No showing is made that this petitioner has been denied due process. He had a fair hearing—a fair trial and that is all the Fourteenth Amendment requires. Due process does not require the finding of an indictment.

STATEMENT OF FACTS.

The petitioner, Martin Kahner, was indicted by the Grand Jury of Hennepin County, Minnesota, on October 20, 1942. The charge against him was that he attempted to dissuade and prevent one Eugene Goulet from appearing as a witness in a criminal case set for trial on October 22, 1944. The charge was made in the indictment and proved upon the trial thereof (and sustained by the Supreme Court of Minnesota) that the petitioner and his attorney tried to induce this witness not to appear upon the trial of the case in which he had been subpoenaed as a witness; that they offered to secure him a job in a defense plant in California and pay his expenses in going there.

The witness so interfered with, Eugene Goulet, was a witness before the grand jury upon the finding of the indictment. Eight other persons also testified before the grand jury upon the finding of the indictment, making nine in all.

Eugene Goulet had been sent to an insane hospital on June 12, 1942, but was only kept there three months and was released therefrom on September 12, 1942.

The petition herein on page 23 thereof lists the names of eight persons who testified before the grand jury which returned the indictment. But counsel have omitted the name of one such witness, Joseph Goulet, father of Eugene, who also testified before the grand jury, and whose name is indorsed upon the indictment as one of the witnesses.

The petition, commencing on page 23, pretends to set out what each witness testified to before the grand jury. Of course the petitioner does not know what testimony any particular witness gave before the grand jury. The proceedings of the grand jury are secret. What any witness said before the grand jury is pure surmise.

As stated, the petitioner has omitted the name of Joseph Goulet, who was a witness before the grand jury. It is equally a matter of conjecture as to what this witness testified to before the grand jury. He was a witness on the trial of the indictment.

The Supreme Court of Minnesota mentions the fact that this witness, Joseph Goulet, appeared as a witness upon the trial; and testified that he heard a part of the conversation between one of the conspirators and the boy. State v. Kahner, 15 N. W. 2d, 105, 107.

SUMMARY OF ARGUMENT.

I.

The petitioner is not entitled to invoke the Fifth Amendment.

11 Am. Jur. 1096.

II.

The petitioner's rights under the Fourteenth Amendment have not been violated.

Frank v. Mangum, 237 U. S. 309, 340, 59 L. ed. 969.

Simon v. Craft, 182 U. S. 427, 437, 45 L. ed. 1165.

III.

The petitioner does not make it appear as a matter of law that incompetent evidence was received before the grand jury.

State v. Kahner, ... Minn. ..., 15 N. W. 2d, 105.

Knox v. Haug, 48 Minn. 58, 61, 50 N. W. 934.

McAllister v. Rowland, 124 Minn. 27, 144 N. W. 412.

Cannady v. Lynch, 27 Minn. 435.

Schultz v. Oldenburg, 202 Minn. 237, 243, 277 N. W. 918.

Champ v. Brown, 197 Minn. 49, 266 N. W. 94.

IV.

Even if the testimony of an incompetent witness was received by the grand jury, an indictment based partly on competent and partly on incompetent evidence will be sustained.

State v. Marshall, 140 Minn. 363, 168 N. W. 174.

Noll v. Dailey, 72 W. Va. 520, 79 S. E. 668, 47 L. R. A. (N. S.) 1207.

Holt v. U. S., 218 U. S. 245, 31 Sup. Ct. 2, 54 L. ed. 1021.

U. S. v. Perlman, 247 Fed. 158, 162.

State v. Grady, 12 Mo. App. 361.

State v. Shreve, 137 Mo. 1, 38 S. W. 548.

31 A. L. R. 1479.

State v. Chance, 29 N. M. 34, 221 Pac. 183, 31 A. L. R. 1466.

Minn. Stat. 1941, § 630.18.

Mason's Stat. 1927, § 10685.

State v. Ruther, 141 Minn. 488, 168 N. W. 587.

State v. Ernster, 147 Minn. 81, 179 N. W. 640.

ARGUMENT.

I.

The petitioner is not entitled to invoke the Fifth Amendment.

His claim is that under the Fifth Amendment he was entitled to be tried under an indictment. But, "the First Eight Amendments, forbid the abridgement only by acts of Congress or the United States Government, its agencies and departments, of the rights therein guaranteed, and do not apply to the acts of the states".

11 Am. Jur. Title: Constitutional Law, 1096.

This petitioner could have been legally brought to trial without even first presenting the case to the grand jury. He could have been tried upon an information filed by the county attorney. Minn. Stat. 1941, Sec. 628.29; Mason's Stat. 1927, Sec. 10664. By such a course his constitutional rights would not be violated because the Fifth Amendment is inapplicable.

There remains only the question whether there has been any violation of the Fourteenth Amendment.

II.

The petitioner's rights under the Fourteenth Amendment have not been violated.

While the petitioner was entitled to a hearing under the due process clause, he was not entitled to any particular procedure or to trial on indictment or to a trial by jury.

Frank v. Mangum, 237 U. S. 309, 340; 59 L. ed. 969.

Quoting therefrom:

> "* * * the due process clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. *Indictment by grand jury is not essential to due process* (Hurtado v. California, 110 U. S. 516, 532, 538; Lem Woon v. Oregon, 229 U. S. 586, 589, and cases cited). Trial by jury is not essential to it, either in civil cases (Walker v. Sauvinet, 92 U. S. 90) or in criminal (Hallinger v. Davis, 146 U. S. 314, 324; Maxwell v. Dow, 176 U. S. 581, 594, 602, 604)."

See Simon v. Craft, 182 U. S. 427, 437, 45 L. ed. 1165, where Mr. Justice White said:

> "But the due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it * * *. If the essential requisites of full notice and an opportunity to defend were present, *this court will accept the interpretation given by the state court as to the regularity under the state statute of the practice pursued in the particular case.*"

III.

The petitioner does not make it appear as a matter of law that incompetent evidence was received before the grand jury.

To sustain this point, a quotation is taken from the decision below.

State v. Kahner, ... Minn. ..., 15 N. W. 2d, 105.

> "A motion to quash the indictment upon the ground that the only evidence received by the grand jury concerning the facts constituting the offense was incompetent, in that it consisted of the testimony of Goulet, who prior to his appearance as a witness before that body had been adjudged insane and had not been restored to capacity. The court denied the motion. * * *
>
> "At the beginning of Goulet's examination as a witness at the trial, defendant objected to his competency upon the grounds that he had been adjudged insane and had not been restored to capacity. The court examined him at length to determine his competency as a matter of fact. It had before it the adjudication of

the probate court of Goodhue county that he was insane, the commitment under which he was taken to an institution for treatment, and the order releasing him from the institution. There was no evidence that Goulet had ever been restored to capacity. The court found, as a fact, that he was competent and permitted him to testify. After the Court determined that he was competent, but before he testified, defendant offered to show further in support of the claim of Goulet's incompetency to be a witness that Goulet had had several positions since his discharge from the institution; that he had misstated his age to obtain one of those positions; and that he had lied on some other occasions. The court held that these offers went not to his competency but to his credibility, and permitted defendant to show those facts upon Goulet's cross-examination. * * *

"We shall assume, without so deciding, that the motion to quash the indictment properly raises the question that it was based upon the claimed to be incompetent evidence of Goulet. The question of his competency was properly raised at the trial. Under Minn. St. 1941, § 595.02(6), (Mason St. 1927, § 9814(6)), 'persons of unsound mind' are incompetent as witnesses. In order to constitute grounds for excluding the witness's testimony, the mental incompetency must exist at the time he is offered as a witness. The determination of the competency of a witness is for the trial court. Where the competency of a witness is challenged upon the ground of unsoundness of mind, the trial court should, as it did here, conduct a preliminary inquiry to enable it to determine the fact of the witness's competency.

"If it appears from the inquiry that the witness understands the obligation of an oath and is capable of correctly stating the facts to which his testimony relates, he is competent in fact and should be permitted to testify. State v. Prokosch, 152 Minn. 86, 187 N. W. 971.

> The competency of a witness depends upon his mental condition when he is offered as a witness and should be determined as of that time. *The fact that the witness has been adjudged to be insane and committed to an insane asylum from which he had been subsequently discharged does not establish as a matter of law his incompetency at the time he is offered as a witness, and, if he is in fact competent at that time, is no ground for excluding his testimony.* Ross v. D. M. & I. R. Ry. Co., 203 Minn. 312, 281 N. W. 76, 271; Cannady v. Lynch, 27 Minn. 435, 8 N. W. 164. See State v. Hayward, 62 Minn. 474, 65 N. W. 63. The fact that the witness had not been restored to capacity (an insane person may be restored to capacity in proceedings under Minn. St. 1941, § 525.61 (Mason St. 1940 Supp. § 8992-143)), is of no importance in this connection. His competency as a witness depended upon his mental capacity at the time he was offered as such. There was no other showing as to Goulet's alleged incompetency when he was a witness before the grand jury. *Hence there was no showing requiring a finding that he was incompetent at that time.*"

It is of course true that a person, who has been committed to an insane asylum and has been released therefrom, may make a valid contract (Knox v. Haug, 48 Minn. 58, 61), or a valid will (McAllister v. Rowland, 124 Minn. 27), if he is sane at the time—so also he may testify as a witness (Cannady v. Lynch, 27 Minn. 435). It was for the grand jury and the court to determine his competency at the time he appeared as a witness. This court is in no position to override their determination of the fact. The trial court made an extended examination as to the competency of the witness on the trial on February 3, 1943, and found him then a com-

petent witness. (See last quotation supra.) It is at least as reasonable to infer that he was competent when he testified before the grand jury on October 20, 1942, as it is to infer that he was then incompetent, especially in view of the fact that the witness was sent home from the asylum on September 12, 1942.

The fundamental misconception of the law under which petitioner is laboring is this:

He asserts that the commitment of a person to the asylum is conclusive evidence of insanity after the patient has been discharged from the hospital.

It is merely evidence to be considered in arriving at a determination whether the patient was insane at a later date. It may be considered. *It is not conclusive.*

Schultz v. Oldenburg, 202 Minn. 237, 243, 277 N. W. 918.
Champ v. Brown, 197 Minn. 49, 266 N. W. 94.

IV.

Even if the testimony of an incompetent witness was received by the grand jury, an indictment based partly on competent and partly on incompetent testimony will be sustained.

State v. Marshall, 140 Minn. 363, 168 N. W. 174.
Noll v. Dailey, 72 W. Va. 520, 79 S. E. 668, 47 L. R. A. (N. S.) 1207, annotation at 1209 and 1210.

The mere fact that some incompetent evidence is received by the grand jury is no ground for quashing the indictment. It is not for this court nor for the trial court to inquire into the sufficiency of the evidence (either that of Eugene or of

the other witnesses) to support the indictment. The presumption is that the evidence was sufficient.

Holt v. U. S., 218 U. S. 245, 31 Sup. Ct. 2, 54 L. ed. 1021.
U. S. v. Perlman, 247 Fed. 158, 162.

In the case of State v. Grady, 12 Mo. App. 361 (cited by appellant) no evidence whatever and no witness was presented before the grand jury; in the later case of State v. Shreve, 137 Mo. 1, 38 S. W. 548, it was held that the reception of incompetent evidence before the grand jury did not invalidate the indictment if, in fact, *one competent witness testified.* Petitioner does not attempt to say what the witness Joseph Goulet testified to before the grand jury.

Attention is directed to this fact: The Minnesota Supreme Court noted that petitioner's co-conspirator talked with both Eugene Goulet and with Joseph Goulet (father of Eugene, whom petitioner forgot to mention as being a witness called before the grand jury), also the testimony of Comstock (15 N. W. 2d, 105, 107),—another grand jury witness. Whether the testimony of these witnesses would justify the indictment is not a question into which the court will inquire—particularly in view of the decision of the lower court in the case. The conclusive presumption is that the evidence was sufficient.

The question of the power of the courts to pass upon the competency, legality or sufficiency of evidence on which an indictment is based is annotated in 31 A. L. R. p. 1479. The annotation is appended to the report of the case of State v. Chance, 29 N. M. 34, 221 Pac. 183, 31 A. L. R. 1466, in which case the court held:

"District Courts are without power to review the evidence submitted to a grand jury upon which an indict-

ment was returned, to determine its sufficiency or insufficiency, existence or nonexistence, legality or illegality, as the finding of such grand jury with regard to such questions is conclusive."

And the author of the annotation cited says:

"In the majority of jurisdictions the rule obtains that the court will not inquire into the legality or sufficiency of the evidence on which an indictment is based, even if it is averred that the indictment was found without any legal evidence being produced before the grand jury. This view is based, by the courts maintaining it, on one or more of the following reasons: That the grand jury is a judicial body whose finding is conclusive as against a motion to quash; that the secrecy of grand jury proceedings will not be invaded; and that a statute prescribing grounds for the quashal of indictments, and not mentioning insufficiency of the evidence, is conclusive."

The author cites the federal courts as adhering to this rule together with a large majority of the state courts.

The Minnesota statute prescribes the grounds upon which indictments may be set aside (Minn. Stat. 1941, § 630.18; Mason's Stat. 1927, § 10685).

Insufficiency or incompetency of the evidence is not one of the grounds specified.

See:

State v. Ruther, 141 Minn. 488, 168 N. W. 587;

State v. Ernster, 147 Minn. 81, 179 N. W. 640.

There is no showing that the petitioner attempted to invoke any provision of the federal constitution in the lower state court.

CONCLUSION.

The petition does not present any federal constitutional question; nor does it show any violation of any federal constitutional right. Proof that a witness was at one time adjudged insane does not as a matter of law establish the incompetency of his testimony at a later time after he has been released from the asylum. Courts will not inquire into the competency or sufficiency of the evidence on which an indictment is based.

The application for a writ of certiorari should be denied.

Respectfully submitted,

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